He gave judgment for the plaintiff and dismissed the defendant's counterclaim, and the defendant has appealed to this court.

The defendant applies by notice of motion for this court to impound P1 so that after payment of duty and penalty it may be admitted and its contents taken into account.

Her counsel states that the learned president should have impounded P1 under section 51, but owing to an oversight he (counsel) failed to bring that section to the notice of the learned president. Counsel further submits that this court has power under sections 29 and 69 of the Courts of Judicature Act to impound P1, and send it for stamping and payment of any penalty due, and finally admit the document.

I agree. P1 should normally have been stamped before or at the time of execution, section 41; but it can also be stamped after execution on payment of a penalty in addition to the stamp duty, section 47. The learned president overlooked his duty under section 51 to impound the document. This appeal is a rehearing, and this court can do what he should have done. The document was all the time in the plaintiff's possession. Before the trial the defendant's solicitors intending to rely on it wrote to the plaintiff's solicitors asking them to have it stamped at the defendant's expense, but they refused to do so. At the trial it was the plaintiff himself who produced the document in evidence. In view of this I think that it is just that this court should impound the document and admit it in evidence on payment of the duty and the penalty if any, and I order accordingly.

Who should pay the duty and penalty? The defendant offered to do so in her pre-trial letter to the other side, but in her notice of motion she says that each side should pay half. I think that it is fair that she should pay the whole amount, and I so order.

The appeal will be resumed after the document has been received back from the Stamp Duty Office, and on a date to be fixed by the Registrar.

*Order accordingly*

Solicitors: *Ariffin & Ooi; Gurdial Bakan Singh.*

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## RAMIAH v. PUBLIC PROSECUTOR

**[A. Cr. J. (Raja Azlan Shah J.) November 3, 1972]**

**[Kuala Lumpur — Selangor Criminal Appeal No. 93 of 1972]**

*Road Traffic — Dangerous driving — What constitutes — Road Traffic Ordinance, 1958 s. 34A(1) — Failure to observe Highway Code.*

The appellant was driving a bus on the main Kuala Lumpur/Ipoh Road. He intended to turn right into Jalan Perhentian. But he did not stop at the junction. The bus collided into a scooter coming from the opposite direction. The pillion rider died as a result of the collision. The learned president found the appellant guilty under section 34A(1) of the Road Traffic Ordinance and sentenced him to one day's imprisonment and fine. He was further disqualified from driving all classes of vehicles for a period of 5 years.

**Held,** dismissing the appeal: in a case under section 34A two things must be established: (a) there must be a situation created by the accused which, viewed objectively, is dangerous; in this case turning right into the side road without stopping to give way to through traffic was dangerous driving; (b) the prosecution must prove that when creating such a situation the appellant was at fault; in this case the accused was at fault in creating the dangerous situation.

*Cases referred to:-*

(1) *Public Prosecutor* v. *Cheong Kam* [1946] M.L.J. 12.

(2) *Public Prosecutor* v. *Low Yong Ping* [1961] M.L.J. 306.

(3) *Lau Lim Peng* v. *Public Prosecutor* [1968] 2 M.L.J. 14.

(4) *R.* v. *Gosney* [1971] 3 All E.R. 220.

(5) *Onassis & Callas* v. *Vergottis* (1968) *The Times*, 1st November.

MAGISTRATE'S CRIMINAL APPEAL.

*Dominic Puthucheary* for the appellant.

*Tengku Suleiman ibni Sultan Ismail Nasiruddin Shah*, (Deputy Public Prosecutor) for the respondent.

**Raja Alzan Shah J.** (delivering oral judgment): The appellant was driving a Sri Jaya bus on the main Kuala Lumpur/Ipoh Road. He intended to turn right into Jalan Perhentian. But he did not stop at the junction. The said bus collided into a scooter coming from the opposite direction. The pillion rider died as a result of the collision. On those simple facts the learned President found the appellant guilty under section 34A(1) of the Road Traffic Ordinance, 1958 and sentenced him to one day's imprisonment and fined him $2,000 in default six months' imprisonment. He was further disqualified from driving all classes of vehicles for a period of 5 years. He appealed against conviction and sentence.

It is not the law under section 34A of the Road Traffic Ordinance that merely because an accident had happened and a person had been killed, danger had in that sense arisen and therefore it must follow, as the night, the day, that the appellant was driving in a manner dangerous to the public. In a case under section 34A, two things must be established. First, there must be a situation created by the accused which, viewed objectively, is dangerous. Dangerous driving is not defined in the Road Traffic Ordinance and it is up to the court to come to a decision on the evidence. Reported cases can only serve as illustrations. For instance as illustrated in *Public Prosecutor* v. *Cheong*

*Kam*,[1] to overtake a cyclist who is far from steady at the moment when a heavy lorry is approaching from the opposite direction is to take an unjustifiable risk and constitutes dangerous driving. In *Public Prosecutor* v. *Low Yong Ping*,[2] driving into the path of an oncoming traffic is dangerous driving. Recently in *Lau Lim Peng* v. *Public Prosecutor*,[3] where a lorry approaching a dangerous bend at a speed far in excess of the speed limit and in order to avoid the vehicle from overturning knocked into the front of another vehicle it was held it was dangerous driving. In the present case turning right into the side road without stopping to give way to through traffic is dangerous driving.

Secondly, the prosecution must prove that when creating such a situation the appellant must be at fault. "Fault involves a failure; a falling below the care and skill of a competent and experienced driver, in relation to the manner of driving and to the relevant circumstances." A competent and careful driver would have stopped at this junction before turning into the side road. This is because section 18 of the Highway Code says that when turning left or right, drivers must always give way to through traffic, including pedestrians. Now, section 59(4) of the Road Traffic Ordinance provides that any court may take into consideration any failure to observe the provisions of the Highway Code. To sum it all, the accused was at fault in creating that dangerous situation. I think the principle of what I have said here is set out fully in *R.* v. *Gosney*.[4]

In essence, the submission of learned counsel is that the learned president who saw and heard the witnesses had arrived at a wrong conclusion. The cases where an appellant in relation to a pure issue of fact can succeed on that ground in an appellate court are very few and far between. The House of Lords in 1968 in the case of *Onassis & Callas* v. *Vergottis*[5] once again stressed that the findings of fact of the trial judge ought not to be disturbed essentially on the credibility of the witnesses. Whether the accused did stop at the junction is a question of fact based on the credibility of the witnesses whom he has seen and heard. The decision turned solely on the impact made on the learned president by witnesses called on each side. It is true that while the appellant, D.W.2 and D.W. 3 asserted that the bus did stop before turning into the side road, the scooterist and the bus-conductor opposed them. But, I have no doubt that the learned president did not make the cardinal error of saying: "three on one side, and two on the other — therefore the three must be right and the two must be wrong." He saw and heard the witnesses, and he came to his conclusion of fact.

Appeal against conviction and sentence dismissed.

*Appeal dismissed.*

Solicitors: *Skrine & Co.*